Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Centennial Michigan RSA 6 Cellular Corp. Centennial Michigan RSA 7 Cellular Corp. Request for Review of Universal Service Administrative Company Decision Pursuant to Section 54.722(a) of the Commission's Rules	CC Docket 96-45

REQUEST FOR REVIEW OF ADMINISTRATOR'S DECISION

Centennial Michigan RSA 6 Cellular Corp. and Centennial Michigan RSA 7 Cellular Corp. (collectively "Centennial"), pursuant to Section 54.722(a) of the Commission's rules,[1] hereby requests that the Wireline Competition Bureau review an action by the Universal Service Administrative Company ("USAC") apparently constituting a decision to take back certain high-cost universal service support disbursed to Centennial for the period from September 11, 2003 through January 31, 2005. Centennial became aware of this apparent USAC decision by means of an email sent to Centennial on August 1, 2005.[2]

Centennial requests that the Commission rule that Centennial be permitted to retain the funds that it received. At a minimum, however, and in accordance with 47 C.F.R. § 54.702(c), Centennial requests that the Commission suspend the effectiveness of USAC's apparent action attempting to "reclaim" the disbursements, because whether and to what extent such

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1 *See* 47 C.F.R. § 54.722. Pursuant to § 1.1105 of the rules, no filing fee applies to this request.

2 As noted below, Centennial does not believe that the email it received constitutes proper "issuance" of a USAC "decision." That said, and out of an abundance of caution, Centennial is filing this request for review within the 60-day time period specified in 47 C.F.R. § 54.720(a) (60 days from August 1 falls on September 30). This action is in any event appropriate in light of the provisions of 47 C.F.R. § 54.702(c) directing that the Commission, not USAC, resolve policy issues surrounding the administration of universal service funding.

reclamation is appropriate involves issues of policy which, under that rule, USAC is not empowered to decide.

I. FACTUAL AND REGULATORY BACKGROUND

On September 11, 2003, the Michigan Public Service Commission ("Michigan PSC") issued an Order designating Centennial as an Eligible Telecommunications Carrier ("ETC") in certain areas of Michigan for the purpose of receiving federal universal service support.[3] In January of 2004, USAC began disbursing monthly high-cost universal service support to Centennial for these areas. Centennial has used all of those funds in providing supported services, consistent with its designation as an ETC.

The Michigan PSC's September 2003 order noted that Centennial would not serve the entire study areas of certain rural telephone companies. That order, however, concluded that it was appropriate to authorize Centennial as an ETC on an exchange-by-exchange basis, and directed Centennial to submit a list of the specific exchanges for which Centennial would be acting as an ETC, which Centennial did. In this regard, this Commission had previously ruled (in 2001) that it did not believe that Congress, in enacting Sections 214(e) and 254 of the Communications Act, "envisioned that the designating entity might need to involve another regulatory body, or seek its permission, before designating an ETC for a service area otherwise lying wholly within its jurisdiction."[4] That same order noted that the substantive concerns about avoiding "cream-skimming" that were the "primary objective in retaining the rural telephone

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[3] *In the Matter of the Application of Michiana Metronet, Inc., Centennial Michigan RSA 6 Cellular Corp. and Centennial Michigan RSA 7 Cellular Corp., for Designation as Eligible Telecommunications Carriers,* Case No. U-13751, Opinion and Order (September 11, 2003). A copy of the Order is attached as Exhibit A.

[4] *See* Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order,* CC Docket No. 96-45, FCC 01-283 (rel. October 5, 2001) ("*Western Wireless Pine Ridge Order*") at ¶ 18.

company's study area as the designated service area of a competitive ETC" had been addressed by subsequent developments."[5] As a result, the Commission specifically ruled, "any concern regarding 'creamskimming' of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated."[6]

Neither Centennial nor the Michigan PSC sought a formal redefinition of any landline rural ILEC's study areas in connection with the Michigan PSC's ruling. However, Centennial sought, and was granted, a waiver of line-count filing deadlines, specifically in order that Centennial could begin receiving funding as of September 11, 2003, the date of the Michigan PSC's decision. That waiver was granted in August 2004.[7]

Meanwhile, in January 2004 – the same month that Centennial began receiving support for the affected areas in Michigan – the Commission issued its *Virginia Cellular* order.[8] In *Virginia Cellular,* the Commission again made clear that issues regarding study area redefinition should not stand in the way of prompt receipt by an ETC of authorized universal service support. For example, the Commission noted that its rules and procedures were intended "to minimize any procedural delays caused by the need for the federal-state coordination on redefining rural service areas." *Virginia Cellular* at ¶ 45 n.135.

On February 1, 2005, the study areas of the rural ILECs in whose service territories Centennial had been designated as an ETC were deemed redefined when the relevant period

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5 *Id.* at ¶ 20

6 *Id.*

7 Public Notice, The Telecommunications Access Policy Division Of The Wireline Competition Bureau Grants Petitions Requesting Waiver Of Various Filing Deadlines Related To The Universal Service Program CC Docket No. 96-45 (August 14, 2004).

8 *In Re Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45 (FCC rel. Jan. 22, 2004) at ¶ 28 ("*Virginia Cellular*").

following the Commission's public notice passed without the Commission initiating a proceeding.[9] To the extent that a formal redefinition was substantively required (in light of the *Western Wireless* ruling cited above), that occurred as of February 1, 2005.

On March 17, 2005, the Commission issued its *Report and Order* in the ongoing Universal Service docket.[10] Among other things, in that ruling, the Commission issued new rule 47 C.F.R. § 54.307(d), which provides for the payment of support to ETCs, including competitive ETCs, retroactive to the date on which the ETC received its designation from the affected state commission. This clearly evinces a Commission policy favoring the provision of USF support to ETCs for a period beginning with the date of the state commission's ETC designation.

On August 1, 2005, Centennial received an e-mail from USAC attaching an electronic remittance statement. This remittance statement reflected negative numbers as "support amounts" for June 2005.[11] Neither the e-mail nor the attached statement contained any description of the meaning of, or any explanation of the basis for, the negative amounts.

Shortly after receiving this email, Centennial contacted USAC by telephone for clarification. USAC advised that it was "reclaiming" support amounts that had previously been paid for certain areas.

After further telephone conversations with USAC staff and a meeting with USAC on August 23, 2005, Centennial came to understand that the support at issue was for those areas

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[9] Public Notice, The Wireline Competition Bureau Seeks Comment On Petition To Redefine Rural Telephone Company Service Areas In Michigan, CC Docket No. 96-45, DA 04-3506 (rel. Nov. 3, 2004). The affected rural ILECs were: CenturyTel of Michigan, Century-Tel Midwest, Pigeon Telephone Company; and Upper Peninsula Telephone Company.

[10] In the Matter of Federal-State Joint Board on Universal Service, *Report and Order,* CC Docket No. 96-45 (released March 17, 2005).

[11] Electronic Remittance Statement, dated August 1, 2005, from USAC to Bill Howells (Centennial). Attached hereto as Exhibit B.

within Centennial's service area served by the rural ILECs noted above, whose study areas had been formally redefined on February 1, 2005. USAC staff had apparently concluded that Centennial should not have received support for the affected areas prior to that date. It therefore simply adjusted Centennial's going-forward payments to reflect USAC staff's calculation of the amounts that, in staff's view, had been overpaid.

USAC had not provided any advance notice that it had concerns about these issues, and did not provide any written explanation to Centennial either of the reasoning leading to its "reclamation" action or of the means by which it calculated the amounts at issue.[12] Instead, Centennial's first awareness that this issue even existed as a matter of concern to USAC was the August 1 email.

II. DISCUSSION

Broadly speaking, there are two problems with the way this matter was handled below. First, Centennial believes that USAC used inadequate procedures leading up to the "reclamation" action, including both lack of notice that the issue was of concern and lack of transparency regarding the calculation of the affected amounts. Second, in light of the FCC rulings noted above, although USAC may have viewed itself as simply correcting an error, in fact there are significant policy questions that must be addressed in resolving this issue. Under 47 C.F.R. § 54.702(c), such matters must be resolved by the Commission, not USAC.

For these reasons, at a minimum, Centennial requests that the Commission direct a suspension of any "reclamation" efforts until the Commission itself has resolved the policy

[12] Centennial understands that USAC now agrees that the amounts purportedly "reclaimed," as indicated in the August 1 email, were not calculated correctly. As of the date of this filing, however, as far as Centennial is aware, USAC has not generated an alternative calculation.

issues. Should the Commission choose to address all of these issues on the merits, Centennial requests that the Commission conclude that no retroactive "reclamation" is appropriate here.

In this regard, it bears emphasis at the outset that there is no underlying substantive problem with respect to the funding Centennial has received. Centennial was properly designated as an ETC by the Michigan PSC. Pursuant to that designation, Centennial applied for and received funding to support expenses and investments associated with providing service in the appropriate areas. Centennial did not receive the wrong amount of funding in light of the number of lines served, nor in light of the per-line amounts available based on funding being provided to the rural ILECs in question. And Centennial has used the funding for its intended purpose. Nothing has "gone wrong" with the funding Centennial has received, in any substantive sense. To the extent that there are any issues here, they are entirely formal and procedural.

A. Inadequate Notice/Procedures

Centennial has from the beginning reasonably relied, in good faith, on the fact that it has been properly designated as an ETC by the Michigan PSC. Based on that status, Centennial properly requested, received, and – in accordance with the requirements of the universal service regime – spent substantial funds from USAC to build out and support the operation of its wireless systems in the affected areas of rural Michigan. To the extent that a government instrumentality such as USAC becomes concerned that funds Centennial has received might have been disbursed in error, simple fairness requires that Centennial be given notice of that concern, and be given an opportunity to address the issue with USAC, before USAC takes precipitous action as it did here. Notice and opportunity to be heard are fundamental requirements of any government program, and the universal service program is no exception.

By any standard, it is clear that the "notice" that Centennial received of USAC's decision to require Centennial to pay back the money at issue here was inadequate. Centennial didn't receive any proper "notice" at all. Centennial did not receive a letter stating what USAC was deciding, or why. Instead, Centennial received an email purportedly regarding "Remittance Statements" – normally, in this context, a designation of amounts that Centennial will be ***receiving*** from USAC – that instead contained some unexplained negative numbers. Only because Centennial questioned the meaning and purpose of the negative "remittance" numbers did the actual issue get identified at all. Centennial submits that, as a matter of simple fairness – not to say as a matter of law – USF participants such as Centennial are entitled to more. At a minimum, Centennial may fairly expect a clear and succinct notice from USAC explaining ***what*** USAC is doing and ***why*** USAC is doing it.

As noted above, adequate notice is fundamental to an affected party's ability to respond. But even more fundamentally, the obligation to provide notice of what an agency is thinking of doing, and why, improves the agency's own operations, by ensuring that the agency thinks through its actions in advance, and is certain that the reasons supporting those actions are valid.

In this regard, and with due regard for the complexities of calculating universal service support, USAC clearly has had difficulty in this case properly explaining and documenting the amount of funding that it seeks to recover from Centennial. Centennial believes – and we believe, at this point, USAC would agree – that the specific amounts for which USAC sought "reclamation" in the August 1 email are in error. However, without a clear and accurate explanation of how USAC calculated the amounts it seeks, Centennial can only speculate. It is clearly not reasonable to require Centennial to return funds that it has already received, and

already properly used for their intended purpose, without a clear and accurate explanation of precisely how much funding is to be returned, and why.

Centennial submits that these "notice" procedures were sufficiently defective as to render USAC's action void. To the extent that USAC has concerns about these matters, it should be required to provide Centennial with advance notice of what action it is contemplating, and why, so that Centennial will have an opportunity to respond in advance of any such action.

B. This Matter Involves Policy Determinations that must be made by the Commission, not USAC.

As the discussion in Section I above suggests, from Centennial's perspective it is clear that this situation raises at several policy issues that, under the terms of 47 C.F.R. § 54.702(c), the Commission, not USAC, must resolve. In each case, of course, Centennial believes that the proper resolution of the policy issue will result in Centennial being permitted to retain the funds that USAC tried to "reclaim." But under Section 54.702(c), Centennial submits, it is not appropriate for USAC to actually reclaim any funds until the policy issues have been resolved.

The first, key policy issue relates to the Commission's policy regarding the coordination of the start of USF funding with the date on which an ETC is designated by a state commission. As noted above, the Commission's recent ruling regarding competitive ETC designation included specific rule changes designed to allow funding to occur as of the date of certification.[13] There is no reason to interpret this policy as, for some reason, ***not*** applying to matters such as routine study area redefinitions.

This is particularly the case here, where more than two years in advance of the Michigan PSC's action, the Commission announced that "any concern regarding 'creamskimming' of customers that may arise in designating a service area that does not encompass the entire study

[13] In the Matter of Federal-State Joint Board on Universal Service, *Report and Order,* CC Docket No. 96-45 (released March 17, 2005).

area of the rural telephone company" – the "primary objective" behind matching a competitive ETC's designated territory to that of a rural ILEC – "has been substantially eliminated."[14] The fact that this same order questioned whether the Commission's rules should be interpreted to require one regulator to seek approval from another when the affected carriers and geographic areas are entirely within its jurisdiction,[15] only adds to the need for policy guidance on this point. The Commission's statements indicating that these issues (study area redefinition obligations, if any) are not really a substantive concern any more only confirm that the Commission's policy of matching up USF funding with the date of state certification can and should be applied here. But, either way, the policy question needs to be resolved, and under 47 C.F.R. § 54.702(c), it must be resolved by the Commission, not USAC.

Second, Centennial submits that how to handle even properly determined and calculated potential "reclamations" is, itself, an important policy issue. The underlying purpose of high-cost universal service funding is to allow designated ETCs to invest in facilities, and support the provision of services, in high cost areas. Centennial has used the money that USAC believes should be "reclaimed" for precisely those purposes. Wireless service in the affected rural areas is more reliable and cheaper than it otherwise would have been. In these circumstances, it is not a mere administrative function to decide that some past procedural error automatically means that the money – already spent, already invested in the network – can simply be yanked back. In effect, "reclamation" involves ***two*** distinct USAC determinations: first, that the money was paid out in error, but also, second, that ***the correct remedy for that error is to call the money back.*** This is not obvious, to put it mildly, for the reasons noted above – the money has been spent for precisely the purposes intended, and there is no evident public policy that is served by taking it

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14 *Western Wireless Pine Ridge Order, supra,* at ¶ 20.

15 *Western Wireless Pine Ridge Order, supra,* at ¶ 18.

back.[16] To the contrary, Centennial believes that it would be inappropriate and inequitable to impose such a result on Centennial.[17]

As noted, Centennial believes that "reclamation" of the affected funds should not be ordered in any event. But clearly, the decision to try to reclaim them involves policy determinations that USAC is not empowered to make. In these circumstances, Centennial submits that, at a minimum, the Commission should suspend any USAC reclamation efforts while this matter is under consideration.

Respectfully submitted,

Centennial Michigan RSA 6 Cellular Corp.
Centennial Michigan RSA 7 Cellular Corp.

By: _____

Christopher W. Savage
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
(202) 659-9750

Their Attorneys

William Roughton
Vice President – Legal & Regulatory Affairs
Centennial Communications Corp.

September 29, 2005

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[16] In this case, the law is clear that the Commission has substantial discretion in determining what monetary consequences should flow even from violations of Commission rules and requirements. *See Virgin Islands Tel. Co. v. FCC,* 989 F.2d 1231, 1240 (D.C. Cir. 1993) (whether to direct refund of payments made under tariff found to be unlawful is matter of Commission discretion, not automatic). *See also Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047-48 (D.C. Cir. 1981).

[17] Centennial notes that this would be a particularly onerous time for the Commission to seek to deprive the company of funds. As the Commission may be aware, Centennial serves not only in the Michigan area, but also in the Texas-Louisiana border area, which was recently severely affected by Hurricane Rita. Depriving Centennial of funds now, in the midst of its efforts to quickly recover its network in that area of the country, would seem to be seriously counter-productive from the perspective of universal service. Note in this regard that, since the funds at issue have already been spent and invested in Michigan, Centennial cannot be expected to somehow come up with them, for purposes of "reclamation," from Michigan. In these circumstances, the "reclamation" simply removes funds from Centennial's overall operations.